end of half an hour the shares to have been issued; if, instead of getting the contract registered within the half-hour the messenger had been detained for an hour, or had loitered on the way, and the contract was not registered till half-an-hour after the actual issue of the certificate — it seems to me that would have been immaterial; and the contract would have been considered registered at the time of the issue. If, in point of fact, in this case Pool had gone straight off to the public office and registered the agreement on the same day, so that the registration had appeared to be on that day, I do not think any one would have raised a question. It would have been substantially one transaction, and whether the certificate were handed over before or after the registration would have been immaterial."

The real question in this case is whether the act of stamping by the plaintiff was substantially one transaction with the act of execution by the defendant. There is no evidence to the contrary as all the three promissory notes were stamped on the very day of their execution. Section 41 of our Stamp Ordinance is *in pari materia* with section 16 of the Indian Stamp Act, 1879 (later repealed by the Stamp Act 1899). The same question arose as early as 1900 in the case of *Surij Mull* v. *Hudson*[12] and the Division Bench of the Madras High Court consisting of Subrahmania Ayyar and Davies, JJ. said:

"We must also disagree with the judge's decision that the promissory note sued upon was inadmissible in evidence on the ground that the stamp was affixed and cancelled after the signature to the note was made. The uncontradicted evidence of the plaintiff shows that the acts were practically simultaneous, and the stamping therefore was done 'at the time of execution' within the meaning of section 16 of the Stamp Act, (I of 1879), which is the Act governing the present case. Even under the present Act, (II of 1899), where 'execution' is defined as meaning 'signature', we do not think it would make any difference if the stamp is affixed and cancelled immediately after the signature, the signing and the stamping being continuous acts in the same transaction."

This view of the Madras High Court has now been fortified and confirmed by the Privy Council in the case of *M. Takim & Co.* v. *Fazal Kassam Velji*[13] which was a case under the Zanzibar Stamp Decree, 1940. Section 19 of the Zanzibar Stamp Decree reads:

"All instruments chargeable with duty and executed by any person in the Protectorate shall be stamped within thirty days of execution:

Provided that any instrument chargeable with duty of ten cents, or twenty cents or promissory notes and bills of exchange shall be stamped at or before the time of execution, or the date of the instrument whichever shall be the earlier."

Lord Somervell in delivering the judgment of the Privy Council said at page 626:

"The provision as to the meaning of execution is 'unless the context otherwise requires.' The word 'at' in the phrase 'at or before' in the proviso to section 19 cannot mean simultaneously with signing, and must therefore cover a reasonable time after signing."

It has been suggested to me this judgment of the Privy Council is not the last word as their Lordships have themselves indicated in the judgment that they would consider the question afresh when the occasion arose. The view of the Privy Council expressed in this case is binding on me and in my opinion on all the courts in this country. The authority is binding on me until such time as the Privy Council decides otherwise. As far as I am concerned it is conclusive for the purpose of the determination of this appeal. There was sufficient compliance with section 41 of the Stamp Ordinance by the plaintiff and as already indicated by me the execution and the stamping cannot but be regarded as one transaction.

The defendant was put to his election by the learned president and he chose not to lead any evidence and decided to stand by his election.

The appeal is allowed. The order of the learned president is set aside. There will be judgment for the appellant in the sum of $2,492.20 with interest at 6 *per cent* as from the date of the filing of the action to the date of realisation. The appellant will also have the costs here and in the court below.

Appeal allowed.

Solicitors: *Chor Pee & Hin Hiong; Gibb & Co.*

GUTHRIE WAUGH BHD. v. MALAIAPPAN MUTHUCHUMARU

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) May 11, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 126 of 1971]

Contract — Deed of arrangement — Consideration for — Whether necessary to support promise by way of a deed of arrangement.

Practice and Procedure — Appeal — Interference by appellate court with finding of fact of lower court.

This was an appeal against the decision of the High Court ([1972] 1 M.L.J. 35).

The issue before the High Court was purely a question of fact, that is, whether there was any consideration for the deed of arrangement to support the respondent's promise. The same issue fell to be determined by the Federal Court.

Held, allowing the appeal: (1) the material facts were wholly overlooked. The estates were never the appellants' customers but were the respondent's own, and they settled accounts at all times with him. They never held the respondent out as their agent;

(2) whereas the respondent paid for the goods, of which he had taken delivery with his own personal cheques, there was no evidence at all that he did so otherwise than as the appellants' customer. The appellants could not have sued any of the estates for any quantity of the goods sold and delivered because there was no proof of delivery to anybody but the respondent. Thus, once the evidence established that the respondent was a customer of the appellants, there was no need to explore the law as to consideration for a contract. Therefore, judgment must be entered for the appellants in the amount claimed, with interest and costs.

Cases referred to:-

(1) *Attorney-General for Ceylon* v. *A. D. Silva* [1953] A.C. 461, 479.

(2) *Sneade v. Wotherton Barytes and Lead Mining Co.* [1904] 1 K.B. 295, 297.

(3) *Barker* v. *Furlong* [1891] 2 Ch. 172, 184.

FEDERAL COURT.

M. Shankar for the appellants.

N. Ramachandran for the respondent.

Ong C.J. (Malaya): The judgment herein appealed against was reported recently in the *Malayan Law Journal* ([1972] 1 M.L.J. 35); otherwise there should have been no need for this written judgment. The simple issue before the High Court was purely a

question of fact: Was there any consideration for the deed to support the respondent's promise? In our opinion the facts disclosed in evidence readily provided a clear answer.

The key to the judge's decision may be summed up in his own words:—

"At the time Exhibit A. 10 was executed the plaintiffs' debtors were the estates and not the defendant. There could then be no forbearance to sue as against the defendant.... The plaintiffs knew, and I do so hold, that the defendant was an agent for the estates and was not acting as a principal in respect of the supplies made to the estates."

The material facts were wholly overlooked. First, the nature of the respondent's business may be seen from his letterheads: "Visiting Agents, secretaries, Dealers in all kinds of Planting Materials, Estate Suppliers and Contractors." Secondly, the course of business followed at all relevant times in the transactions between the parties was set out clearly in an admission contained in the letter dated November 24, 1969 from the respondent to the appellants. The material portion reads as follows:—

"As you wanted a guarantee for the amount owed by all the estates, my Agency will undertake to collect from the estates concerned and pay to you as I have been doing since February 1968."

Thirdly, the respondent elected to give no evidence in answer to that of Mr. K.B.K. Currie, the general manager of the appellants' chemicals division, who stated:—

"The order for the goods required by those estates came from the defendant. At the time of placing those orders the defendant lodged with us one of his own post-dated cheques. It was a cheque signed by the defendant. This was done at the defendant's request. We were dealing with the defendant. If he had not given us his post-dated cheque the goods would not have been supplied. The deliveries were made to the defendant. I am not able to say what he did with the goods supplied. Although he wrote to us that the goods were for supply to particular estates we were not concerned with supply to those estates. We were concerned only with him. ... It was the defendant who took delivery of the goods .... there is no truth in the statement that payment was to be made by the estates and not by the defendant. There never was an occasion where payment was received directly through the estates. It is, however, possible that the defendant might have forwarded to us cheques drawn by one or more of the estates.... Several of those estates had no business registration or registered address.... The lodgment of post-dated cheques was done at the defendant's own request. I do not know when this system started, but when I came to West Malaysia the system was already there. ... The estates represented by the defendant never placed a direct order with us. All their orders came from the defendant ... We looked to the defendant for payment. There was no direct contact between our company and the estates in question. At no time did we make any demand from the estates.... The defendant was to pay us the money. We were not concerned with wherefrom he got the money. ... There are a few cheques issued by third parties but made negotiable and handed to us by the defendant. Those cheques were not from the estates or persons connected with the estates, but from strangers.... In reality goods were supplied to the defendant when he physically took delivery by his own transport or by transport nominated by him, or there was a direct delivery to a destination nominated by him."

All the above statements of fact made by Mr. Currie stood uncontradicted. On this evidence, fortified by the respondent's own admission in his letter of November 24, 1969, it is clear beyond peradventure that orders were placed by the respondent (who, it is to be remembered, was himself a dealer in estate supplies), that each order was accompanied by his own post-dated cheques, that delivery was made to him or on his instructions, that no estate named by the respondent ever held him out as its agent, that no payment for goods supplied was made direct by any estate to the appellants and that, on the contrary, all payments "since February 1968" were made by the respondent.

In short, the estates were never the appellants' customers. They were the respondent's own and they settled accounts at all times with him. They never held the respondent out as their agent. If he held himself out as such, no representation by any agent as to the extent of his authority could amount to a holding out by the principal: see *Attorney-General for Ceylon* v. *A. D. Silva*.[1] Whereas the respondent paid for the goods, of which he had taken delivery, with his own personal cheques, there was not a scrap of evidence that he did so otherwise than as the appellants' customer. The appellants indeed could not have sued any of the estates for any quantity of the goods sold and delivered because there was no proof of delivery to anybody but the respondent.

Any deed or agreement executed or made in the ordinary course of business between merchants and traders must be presumed as intended to be legally binding. The first question one asks onself is why the respondent, a person of more than average business acumen, should gratuitously undertake to pay the debt of third parties, if he did not accept legal liability therefor. He had his own legal advisers. Once the evidence established that the respondent was a customer of the appellants, what need was there to explore the law as to consideration for a contract? On the facts it would appear — and we say so with the utmost respect — that an academic exercise is far better reserved for professors of law. This appeal must accordingly be allowed and judgment entered for the appellants in the amount claimed, with interest as prayed and costs, both here and in the court below.

Before leaving this case, we must say in all fairness to Mr. Currie, that the observations made in the judgment of the High Court casting reflections on him were wholly unwarranted and learned counsel for the respondent, very properly, expressed his concurrence with this view in open court.

Gill F.J.: This is an appeal against the dismissal by Sharma J. of the plaintiffs' action in respect of their alleged claim against the defendant in the sum of $123,050.61. The action was commenced in the High Court at Seremban on August 21, 1970 by a specially indorsed writ.

The facts in support of the plaintiffs' claim, as set out in their original statement of claim, were as follows. The plaintiffs supplied goods to 22 different estates to the total value of $123,050.61. The defendant assumed responsibility for the payment of the said sum to the plaintiffs. On June 24, 1970 the defendant entered into a deed of arrangement with the plaintiffs to pay the said sum not later than June 30, 1972 by monthly instalments of $500. The first of such instalment was to be paid on June 30, 1970

and thereafter on the last day of each succeeding month until the whole of the said sum shall have been paid. If any monthly instalment was not paid within 15 days from the date on which it became due and payable, then the whole of the said sum of $123,050.61 or the balance thereof was to become due and payable to the plaintiffs. The defendant had failed to make any payment up to the date of the filing of the action.

In his original statement of defence filed on October 15, 1970 the defendant averred as follows. The plaintiffs may have supplied goods to the estates but he was not responsible for the payment. He never gave a full and free consent to the deed of arrangement, and after he had signed it the plaintiffs kept sending their statements of account to the various estates thereby showing their intention of not holding the defendant liable. The plaintiffs were holding certain cheques of his contrary to the understanding that the deed of arrangement would only be signed by him conditional upon the return of the said cheques. As the plaintiffs had failed and refused to return to him the said cheques the deed was not binding upon him. In the premises the said deed of arrangement was void and unenforceable (para. 10). In short, the defences to the plaintiffs' claim were those of *non est factum* and breach of condition precedent.

On March 30, 1971 the defendant filed his first amended statement of defence whereby paragraph 10 of the statement of defence was amended to read:

"Further and in the alternative the defendant says that the deed alleged to be a deed of arrangement (whatever this may mean) is void and unenforceable and in the further alternative contends and will contend at the trial that the statement of claim discloses no cause of action and is bad in law."

When the case came on for trial on April 16, 1971 counsel for the plaintiffs, Mr. Shankar, applied for and obtained leave to amend paragraph 3 of the statement of claim to the effect that the defendant had assumed responsibility for the payment of the amount claimed by the deed dated 24th day of June, 1970. Mr. Ramachandran as counsel for the defendant then informed the court that he intended to take the point, although it was not expressly taken in so many words in the defence but was covered by the term "void", that the deed was void for want of consideration.

On the pleadings as they stood the learned trial judge framed the following two issues:—

(1) Whether the statement of claim disclosed any cause of action, and

(2) whether the deed of arrangement dated 24th June 1970 was void and of no legal effect as against the defendant.

He then ruled that the onus on both issues lay on the defendant and directed issue No. 1 to be tried as a preliminary issue. There followed legal arguments by both counsel on this issue, at the close of which the judge directed the plaintiffs to amend their statement of claim so that the real question which was obvious from the perusal of the documents in bundles A and B could be determined. In particular, the judge directed that the statement of claim be amended so that the objection as to the absence of consideration, which was taken by the defendant that morning, should appear to be expressly covered and met in the statement of claim. This resulted in the second statement of claim dated April 16, 1971 being put in. An application at that stage by Mr. Ramachandran to have paragraph 4A(a) and (b) of this amended statement of claim struck out was rejected, and the case was then adjourned until the next morning to enable Mr. Ramachandran to take instructions on paragraph 4A(c) and (d) of the amended statement of claim. A re-amended statement of defence, as required to be filed and served before 3.45 p.m. on that day, was duly filed. This was the final statement of defence.

The trial of the action continued on April 17, 1971 when Mr. Ramachandran submitted that it was for the plaintiffs to prove consideration, whereupon the learned judge framed the additional issue as to whether there was consideration for the deed (A10) upon which the plaintiffs were suing, and ruled that the onus on this issue lay on the plaintiffs. Mr. Ramachandran then informed the court that he was not relying on the plea of *non est factum*.

I would pause here to observe that the defence of *non est factum* having been abandoned and the defence of breach of condition precedent not being pressed at the trial, the case fell to be decided solely on the question as to whether there was any consideration for the deed of arrangement on which the claim of the plaintiffs was based. It was upon that basis that counsel for the plaintiffs proceeded to call evidence in support of his case. After the only witness for the plaintiffs, Mr. Keat Brook Kennedy Currie, had given part of his evidence by 1 p.m. on April 17, 1971, the case was adjourned to May 20, 1971 at Malacca.

The evidence of Mr. Currie was continued at Malacca on May 20, 1971. Towards the close of the plaintiffs' case Mr. Shankar applied for and obtained leave to amend paragraph 4A(c) of the second amended statement of claim. This brought in the third and final amended statement of claim. At Mr. Ramachandran's request Mr. Currie was recalled, and after he had answered a few questions put to him, Mr. Shankar closed the case for the plaintiffs, whereupon Mr. Ramachandran informed the court that he was not submitting that the plaintiffs had not made out a case but that he only wished to say that he did not wish to produce any evidence. On being asked by the court, Mr. Ramachandran said he stood by his decision not to call any evidence, whereupon the learned judge made a note that Mr. Ramachandran had been duly put to his election. The learned judge then held that the defendant had to begin, and the case was adjourned to May 21, 1971 when Mr. Ramachandran made his submissions in the case followed by submissions by Mr. Shankar, after which judgment was reserved. Judgment was delivered on November 26, 1971. In the event, the plaintiffs' action was dismissed. Hence this appeal.

In dealing with the appeal the first observation which I wish to make is that once the trial court had

allowed the pleadings to be amended, the case fell to be decided on the basis that such amendments had been inserted from the beginning (see *Sneade* v. *Wotherton Barytes and Lead Mining Company*[2]).

On the question of consideration, the plaintiffs in paragraph 4A of their final statement of claim averred that the deed was supported by consideration in that —

"(a) the plaintiffs had supplied goods to the value and to the estates stated in the deed at the express request and recommendation of the defendant;

(b) it was understood between the parties that the defendant could assume sole responsibility for the said debts which the plaintiffs agreed to;

(c) by entering into the said deed the plaintiffs forbore to sue the estates mentioned therein or the defendant on cheques issued by him in favour of the plaintiffs and granted an extension of time for the payment of the debt, which they would otherwise have immediately enforced;

(d) by reason of the said promises of the defendant the plaintiff agreed to supply further goods at the defendant's request;

(e) finally as to the deed sued on the defendant requested for time to pay till 30th June 1970 on the first instalment and the plaintiffs agreed thereto."

The defendant's answer to the question was in the following paragraphs of his statement of defence:—

"10A. The defendant denies paragraph 4A and says that Messrs. Guthrie (Far East) Ltd. approached him and invited him through their agent one Fook Kee Lim to introduce to the defendant's customers (the estates) a special fertiliser which the plaintiffs were then seeking to introduce into the market.

The defendant was then recommending his said customers to use I.C.I. fertilisers and other fertilisers.

As the plaintiffs promised to give the defendant a commission on all estate-supplies supplied by the plaintiffs (including fertilisers) to the defendant's customers the defendant agreed to recommend the plaintiffs' fertilisers to the estates.

10B. The plaintiffs were to supply goods to the estates directly although the orders were to be placed through the defendant to enable the defendant to check commissions due.

10C. The plaintiffs were to bill the estates and collect from the estates the amounts due but each order placed by the defendant on behalf of the estates was accompanied by a post-dated cheque which the plaintiffs returned when they received payment from the estates directly or through the defendant.

10D. The plaintiffs commenced business in 1969 and took over the arrangement which the defendant had with Guthrie (Far East) Ltd. and in the confusion of taking over the plaintiffs asked the defendant if he would agree to a consolidation of its all estates accounts into his own name.

The plaintiff (this should perhaps read 'defendant') agreed and hence the unilateral alleged deed of arrangement.

10E. (i) To prevent further confusion the defendant requested the plaintiffs not to forward their bills or statements to the estates to which the plaintiffs agreed but nevertheless continued to do so.

(ii) The plaintiffs were also requested to write to all the estates and request them to pay for the goods supplied direct to the defendant to enable the defendant to collect the dues from the estates and at the same time continue to supply the estates only through the defendant.

(iii) The plaintiffs failed to write to the estates as agreed nor did they supply any goods to the estates through the defendant as they had no supplies available.

10F. When the defendant signed the alleged deed the defendant was not aware that the plaintiffs had no intention to supply further goods to the estates even on a cash basis.

10G. Reference paragraph 4A(c) the plaintiffs never forbore to sue the estates and never entered into any such undertaking either with the defendant or the estates or any of them."

It is to be observed that the defendant spoke of the estates as his customers, notwithstanding his assertion that the plaintiffs were to supply goods to the estates directly. In any event, he chose not to give any evidence in court in support of his case.

That brings me to the second observation which I have to make, namely, that as the defendant, who was present in court throughout, had failed to give any evidence in support of his case, every reasonable presumption should have been made against him on the facts (see *Barker* v. *Furlong*[3]), and that no inference could be made against the evidence of the plaintiffs in the absence of credible rebutting evidence which in this case was totally absent.

It would seem clear that the learned judge directed the pleadings to be amended to bring out the real issue between the parties, because he held that the defendant's preliminary objection as regards absence of consideration for the deed was not a real one if one read it along with the other correspondence. As regards consideration he held, in my opinion quite rightly, that —

(a) further consideration consistent with the deed could be proved by parol evidence,

(b) he was entitled to look at the whole of the correspondence which preceded the contract to see what the promise was,

(c) an express agreement to give time is good consideration as forbearance to sue,

(d) even past consideration is good consideration in Malaysia,

(e) where a debtor is released and a new debtor is accepted that furnishes good consideration,

(f) where a creditor entitled to sue, gives time to pay on defendant's request, that is enough forbearance to constitute consideration,

(g) it was not necessary that there should be an arrangement for forbearance for any definite time; it was enough if from surrounding circumstances a request for forbearance could be implied.

In his judgment, however, he took the reverse position that he should have found in favour of the defendant. I must say with respect that in doing so he completely overlooked the unrebutted evidence for the plaintiffs.

The findings of fact made by the judge on the strength of which he dismissed the plaintiffs' claim are to be found in the last three pages of his lengthy judgment. He begins by saying —

"The plaintiffs in order to succeed must either show that there was consideration for the execution of the deed Exhibit A10 or bring their case under clauses (a), (b), or (c) of section 26 of the Contracts Ordinance. According to P.W.1 the defendant sent a post-dated cheque with each order and that if such a cheque did not accompany the order the plaintiffs would not supply goods to the estates. If that was so, the plaintiffs should have in their possession cheques amounting to $123,050.61. P.W.1 further went on to say that it was the defendant himself who wanted to send a post-dated cheque with each order. I am not prepared to and do not believe P.W.1 on that."

With respect, it is true that the plaintiffs did not produce cheques to the value of $123,050.61, but it was not necessary for them to do so as they were not suing on the cheques. Mr. Currie produced such cheques as he could find merely to prove a practice which defence counsel had challenged in cross-examination contrary to his own pleadings, and he stated that a further search was likely to produce more cheques. It has to be remembered that the practice of post-dated cheques began only in mid-1969, so that whatever debts were due prior to that date would not have been backed thus. Moreover, there was no evidence to show the precise quantity of goods ordered and unpaid for after the system of post-dated cheques began, and the accounts were running accounts. As regards the learned judge's statement that he was not prepared to and did not believe P.W.1 on that point, the question is what evidence was there to contradict what Mr. Currie said? Mr. Currie was certainly not saying something which was inherently improbable.

The learned judge goes on to say:

"No reasonable man putting himself in the position of the defendant would like to take upon himself the onerous and riskful task of placing an order with the plaintiffs and accompanying it with a post-dated cheque, especially when I have already found as a fact that the plaintiffs looked for and expected payments for the supplies from the estates and not the defendant until the deed Exhibit A10 was executed. Furthermore if the handing in of post-dated cheques was the invariable practice a mention of it was bound to have found a prominent place in the correspondence between the parties and in the deed Exhibit A10 itself. In my view there was no necessity or use of the deed Exhibit A10 if the plaintiffs were the holders of the cheques totalling $123,050.61."

Again, with respect, a short answer to the findings contained in the above passage is that they are entirely against the uncontradicted evidence of Mr. Currie that no orders were placed by the estates at any time and that the plaintiffs were concerned only with the defendant who alone ordered the goods. In the light of his unrebutted evidence that the defendant's orders were backed by post-dated cheques, the question as to whether any reasonable man would do what the defendant in fact did had no relevance to the issue, and there certainly was mention of the post-dated cheques in the correspondence when the defendant was asking the plaintiffs not to bank them. The truth is that the defendant was no fool in taking upon himself what the learned judge calls the onerous and riskful task of backing his orders with post-dated cheques, because he knew that had he not done so the delivery of the goods to him for the estates would have stopped resulting in the loss of his commission on such orders. He knew what he was doing, and he did so with his eyes open. As regards the learned judge's observation that there was no necessity for the deed if the plaintiffs were holders of the cheques totalling $123,050.61, the answer is that it was at the defendant's own request that the deed was prepared, and he consulted his solicitors before he signed it. The reason for his doing so was obvious. He did not want the plaintiffs to sue him on the cheques.

To continue with the learned judge's findings he next says:

"At the time Exhibit A10 was executed the plaintiffs' debtors were the estates and not the defendant. There could then be no forbearance to sue as against the defendant. I do not think P.W.1 was at all frank when he said that the defendant fully understood that the plaintiffs intended to and could take legal action against him on the cheques. The plaintiffs knew, and I do so hold, that the defendant was an agent for the estates and was not acting as a principal in respect of the supplies made to the estates. The various estates, and not the defendant, being the debtors, I fail to understand how any of the clauses of section 26 of the Contracts Ordinance can be said to be applicable."

I must say once again, with respect to the learned judge, that there was no evidence that at the time exhibit A10 was executed the plaintiffs' debtors were the estates and not the defendant. The defendant chose not to give evidence to contradict Mr. Currie's evidence that there was no direct contact between his company and the estates, that all the orders came from the defendant and that his company looked to him for payment. He must therefore take the consequences. I do not think there was any justification for the criticism that P.W.1 was not at all frank, when there was the clearest indication from the evidence that the defendant executed the deed to save himself from being sued. In any event, what impediment was there to the defendant being sued on the cheques? As stated by counsel for the appellants in his written submissions, it was perhaps unfortunate that the learned judge went on to consider section 26 of the Contracts Ordinance at some length, because it was no part of the plaintiffs' claim that section 26 applied. Counsel for the appellants went on to say that in the process of this roving commission the clear guide lines laid down by the judge earlier became completely obscure, with the result that the effect of the evidence before him was either completely distorted or in some cases overlooked altogether. I must say that there is a good deal of substance in these two submissions.

The learned judge concludes his findings as follows:—

"The suit is not on the cheques. Some of the cheques might have been dishonoured but that is neither here nor there in as far as the issue of the existence of consideration for the execution of Exhibit A10 is concerned. Even if the defendant was aware that he could be sued on the cheques unless he executed the deed Exhibit A10, such a knowledge alone would not constitute consideration for the deed executed, a deed which makes no reference whatsoever to those cheques. I find that as far as the defendant was concerned, the deed Exhibit A10 was executed by him neither for any past consideration, nor in respect of any forbearance to sue him for the supplies made to the estates, nor in consideration of any promise to supply him goods on credit in future. In short the deed was without consideration as understood in our law. The fact that the deed is under seal makes no difference whatsoever. All that the defendant can be said to have undertaken was a moral obligation and no more."

Now, it is clear that the suit was not on the cheques for the simple reason that they became superfluous when they were superseded by the deed. If the plaintiffs were entitled to sue on at least some of the cheques which might have been dishonoured, as they undoubtedly were, the forbearance to sue was sufficient consideration for the deed. It is trite law that the court is not concerned with the inadequacy of consideration. It is true that knowledge on the part of the defendant that he could be sued on the cheques by itself would not constiute a consideration for the deed, but such knowledge, coupled with an implied request not to sue, would be ample consideration. As

I have already said, there was no reference to the cheques in the deed because the deed superseded them. The consideration for the deed was not stated in it, but it was for that very reason that the plaintiffs had their statement of claim amended so as to aver the consideration. Evidence as to the circumstances under which the deed came to be executed was rightly allowed to go in. Once that evidence was in and it was unrebutted, consideration was proved up to the hilt. The deed was in respect of the past debts of the defendant. How then can it possibly be said that the deed was not for any past consideration? As regards forbearance to sue, there was ample evidence from which it could be implied, and there were clear indications in the evidence of an express request not to sue. With great respect to the learned judge, the deed was not without consideration as understood in our law which he himself had correctly stated earlier in his judgment. I agree that the fact that the deed is under seal makes no difference whatsoever. That obviously was the reason why the plaintiffs made no point about it. I regret to say that I find myself unable to agree with the learned judge when he says that all that the defendant can be said to have undertaken was a moral obligation and no more.

The plaintiffs' claim may not have been simple, straightforward and indisputable on their original statement of claim, but on the facts pleaded in their final statement of claim, especially in relation to consideration for the deed, and more than substantiated by the unrebutted evidence for the plaintiffs, the claim certainly became so, so that the plaintiffs were clearly entitled to judgment.

In the circumstances, I agree with the learned Chief Justice that this appeal be allowed and that there be judgment for the plaintiffs in the amount claimed with interest as prayed and costs.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Ramachandran & Co.*

WENG LOK MINING CO. LTD. v. HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS LTD.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) May 25, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1971]

Practice and Procedure — Appeal to Yang di-Pertuan Agong — Application for leave to — Value of subject matter less than statutory minimum for appeal — Consideration of whether subject matter fit one for appeal, notwithstanding — Courts of Judicature Act, 1964, s. 74(1)(a)(iii).

This was an application for leave to appeal to His Majesty, the Yang di-Pertuan Agong.

The appellants were miners working adjacent to the property of the respondents, who were brickmakers. In March 1965, the respondents complained to the appellants that water was seeping into their property. This allegation was denied. In March or April 1965, the appellants, however, found it necessary to build a safety bund. An existing bund had to be raised higher, and another constructed, which intruded some 40 feet across the boundary into the respondents' property. This encroachment was constituted by a body of water straddling the common boundary. Sometime in April 1965, the water spilled over and flooded the respondents' property, causing damage for which they claimed compensation.

The learned trial judge found for the respondents on the issue of liability and held that the respondents were entitled to succeed under the rule in *Rylands* v. *Fletcher*(1) as well as in negligence and nuisance, and awarded general damages of $3,000 and costs.

The Federal Court allowed the appellant's appeal ([1972] 1 M.L.J. 156). The respondent applied for leave to appeal to the Yang di-Pertuan Agong.

Held, allowing the application: this case was a fit one for appeal because it was of vital importance in the public interest that any appellate court, especially the court of last resort in this country, should as a matter of course state adequately its reasons for reversing the decision of a subordinate court. Therefore, the respondents were entitled to a further appeal in order that justice may not only be done but seen to be done.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

(2) *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43, 44.

FEDERAL COURT.

M. Shankar for the applicants/respondents.

S. D. K. Peddie for the respondents/appellants.

Ong C.J. (Malaya) (delivering judgment of the court): The appellants were miners working lands adjacent to the property of the respondents, who were brickmakers. Hydraulic mining, as in this case, requires a constant supply of water in circulation, which is conserved in pools or reservoirs; from there the water is drawn for the monitors and gravel pumps, after which it is returned *via* the dumping areas into the reservoirs to be used again. Where there are no natural pools, water has to be artificially retained in reservoirs and prevented, if necessary, by bunds from escaping. In any case, whenever a rise in the water-level — by reason of heavy rains or otherwise — is likely to cause the overflow spilling on to low-lying lands in the vicinity, such escape of water from the reservoirs has to be prevented by bunds.

In March 1965 the respondents complained to the appellants that water was seeping into their property. Though this allegation was denied by the appellants, it was nevertheless a fact that they found it necessary in March or April 1965 to build what their manager described as a safety bund. An existing bund on the right had to be raised higher and another constructed on the left, which intruded some 40 feet across the boundary into the respondents' property. This encroachment was constituted by a body of water straddling the common boundary. It was described by the Inspector of Mines, D.W.5, as 20 to 25 feet deep and 6 to 7 acres in extent, of which approximately 0.61 acre was situate on the respondents' property. The miners discovered this encroachment in late 1964, that is to say, some six months before the escape of water complained of. Sometime in April 1965 the water spilled over and flooded the respondents' property, causing damage for which they claimed compensation in the High Court.

On the issue of liability the trial judge found for the respondents. He held that, on the evidence, they